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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 991

JOSEPH E. SNOWDEN,

petitioner,

vs.

EDWARD J. HUGHES, LOUIE E. LEWIS AND ROBERT E. STRAUS, ELI M. STRAUS AND JAMES LEVY, AS CO-EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY HORNER, DECEASED,

respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OPPOSING PETITION FOR CERTIORARI.

HERBERT M. LAUTMANN,
ISAAC E. FERGUSON,
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BRIEF OPPOSING PETITION FOR CERTIORARI.

I.

Petitioner's complaint fails to show that he was deprived of any personal or property right in violation of the constitution and laws of the United States.

All that is alleged in the plaintiff's complaint, essentially, is that in the primary election held April 9, 1940 in the third senatorial district of Illinois the plaintiff was one of several candidates for nomination on the Republi-

* Opinion; 132 F. 2d 476.

can ticket for the office of state representative; that two Republicans were to be nominated; that in the first instance the votes were tabulated by the canvassing board of Cook County, Illinois, and that said board made a return to the secretary of state indicating that Charles J. Jenkins received the highest number of votes among the Republican candidates and petitioner the second highest; that, notwithstanding the return made by the canvassing board of Cook County and published by the secretary of state in a pamphlet purporting to show the official vote cast at the primary election, the members of the state primary canvassing board, contrary to the provisions of the Illinois election laws, wilfully, maliciously and arbitrarily failed to designate plaintiff as one of the Republican nominees for the office of representative in the general assembly from the third senatorial district in Illinois. (R. 2-10.)

Thus, the right said to have been infringed by the members of the state primary canvassing board—assuming the truth of the complaint—was the alleged right of the petitioner to be declared a nominee in an election to be held for members of the Illinois general assembly. Such alleged right, manifestly, is not traceable to the constitution and laws of the United States, but only to the constitution of the laws of the State of Illinois.

Adoption of the 14th amendment to the constitution of the United States did not confer on the federal government general supervisory control over state elections. The alleged erroneous application by the members of the state primary canvassing board of the Illinois election laws, even though characterized as wilful, malicious and arbitrary, did not give rise to a cause of action against the members of the board under the Civil Rights Act. Otherwise every charge by a defeated candidate that the state election officers failed properly to perform their duties would constitute a controversy cognizable under federal

law. The contrary was declared by this court in *Taylor* v. *Beckham*, 178 U. S. 548, 44 L. ed. 1187.

The right to be a candidate to the office of state representative is a right of state citizenship, not of national citizenship. The 14th amendment did not confer upon citizens of the United States any new rights, privileges or immunities. It did not bring within the protection of the national government the great body of civil rights pertaining to state citizenship, but only the special rights incident to national citizenship. (*Twining* v. *New Jersey*, 211 U. S. 78, 92-99; 53 L. ed. 97, 103-106; *Madden* v. *Kentucky*, 309 U. S. 83, 90; 84 L. ed. 590, 594; *United States* v. *Bathgate*, 246 U. S. 220, 226; 62 L. ed. 676, 679.)

Although the plaintiff argues that he was denied "the equal protection of the laws," the complaint points to no legislation by the law-making body of Illinois, nor ruling or action by any agency or officer of the state, applying one rule of law to the plaintiff, as an individual or member of some special class, and a different rule of law to other individuals or classes in like situation. The plaintiff, when he became a candidate for the office of state representative, became subject to the authority and procedure of the state primary canvassing board, not in some special discriminatory way, but only to the same extent and in the same manner as all other candidates. The facts alleged in the complaint, even if true and complete, amount only to a charge that there was denied to the plaintiff a correct and just application of the laws of Illinois, but not that there was denied to him the "equal protection" of the laws. (See *Mitchell* v. *Greenough* (C. C. A. 9), 100 F. 2d 184, cert. den. 306 U. S. 659; *Brawner* v. *Irvin* (C. C. Ga.), 169 Fed. 964.)

Petitioner urges further that he was deprived of "a fundamental liberty" without due process of law, in violation of the 14th amendment. The complaint does not

allege that the statutes of Illinois prescribing the authority to be exercised and the procdure to be followed by the state primary canvassing board are inherently repugnant to the due process guarantee of the 14th amendment; nor that in this particular instance the state canvassing board did not have jurisdiction to canvass the votes and declare the result; nor that in this particular instance the state canvassing board did not follow the prescribed procedure; but only that the result reached by the board in this instance was contrary to the laws of Illinois. The facts alleged in the complaint do not warrant plaintiff's legal conclusion that he was deprived of "a fundamental liberty" without due process of law. If every decision by a state court or administrative board were open to challenge under the 14th amendment, upon the mere assertion that the decision was erroneous and arbitrary and that thereby the defeated party was denied the due process of law and the equal protection of the laws, the obvious result would be to bring within the scope of the Civil Rights Act—and within the original and appellate jurisdiction of the federal courts—every claim that state rights had been violated by the state tribunals or officers. The 14th amendment has no such reach.

II.

The circuit court of appeals properly decided that the action of the members of the state primary canvassing board was not "state action" within the meaning of the 14th amendment.

The complaint of the plaintiff alleges that the members of the state primary canvassing board deliberately disobeyed the state election laws. Undoubtedly this act was an official act, whether lawful or unlawful, but every act of a state officer or administrative agency is not "state action" within the purview of the 14th amendment. The

state action proscribed by the 14th amendment is that which abridges the immunities of citizens of the United States, or deprives a person of life, liberty or property without due process of law, or denies to him the equal protection of the laws. Accordingly, on a complaint that rights protected by the 14th amendment have been violated, there is to be considered: (1) whether the act affects a privilege or right of the kind shielded by the 14th amendment; (2) whether the act complained of, even though done by state officers in course of their official duties, may properly be considered as state action.

It is true, of course, that the state can act only by its officers. But there are many state officers, of many grades, and the state power is divided among them. Every act of a state officer, by virtue of his office, may be in a logical sense an exercise of state power, yet of such minute, tentative or isolated character that it does not amount to a state practice, or a procedural or substantive ruling sanctioned by the state. Therefore, even though it is the act of a public officer or agency, it may be said to constitute individual action rather than state action. A mandate directed to a state, such as the 14th amendment, does not extend to every act of a state officer or agency, but only to such action to which "sufficient state sanction was given * * * to make it the action of the state." And when the state expressly forbids an act by its own legislation, and the plaintiff does not claim that the law has been systematically ignored or evaded, or that it has been discriminatorily applied against a class of which he is a member, the plaintiff is complaining not of action sanctioned by the state but rather the unsanctioned action of individual state officers. Such unsanctioned official action is ordinarily remediable by the state's own processes, administrative or judicial,* but at any rate does not come within the reach of the 14th

* In the case at bar, the complaint does not allege that the plaintiff was without remedy in the state courts, or that if he sought such remedy upon what grounds it was denied.

amendment (and consequently, within the reach of the Civil Rights Act).

The petitioner invokes the decision in *United States* v. *Classic*, 313 U. S. 299, 85 L. ed. 1368, wherein this court reversed the judgment of the district court sustaining a demurrer to an indictment in a prosecution under sections 19 and 20 of the Criminal Code. The defendants were commissioners of election in one of the precincts of New Orleans, Louisiana, and the charge was that they falsely counted the ballots of voters in a primary election held to nominate a candidate for the office of representative in congress and thereby deprived qualified voters of the right to vote and have their ballots counted. This court said (313 U. S. at p. 314, 85 L. ed. at p. 1377):

> "* * * The primary in Louisiana is an integral part of the procedure for the popular choice of Congressman. The right of qualified voters to vote at the congressional primary in Louisiana and to have their ballots counted is thus the right to participate in that choice.
>
> "We come then to the question whether that right is one secured by the constitution. Section 2 of article 1 commands that Congressmen shall be chosen by the people of the several states by electors, the qualifications of which it prescribes. The right of the people to choose, whatever its appropriate constitutional limitations, where in other respects it is defined, and the mode of its exercise is prescribed by state action in conformity to the constitution, is a right established and guaranteed by the constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right. * * *
>
> "Obviously included within the right to choose, secured by the constitution, is the right of qualified voters within a state to cast their ballots and have them counted at congressional elections. This court has consistently held that this is a right secured by the constitution. * * * And since the constitution command is without restriction or limitation, the right, un-

like those guaranteed by the fourteenth and fifteenth amendments, is secured against the action of individuals as well as of states."

This court then went on to consider the question whether the right to choose a candidate at a primary election is embraced in the right to choose representatives secured by article 1, § 2, and the majority of the court answered the court in the affirmative.

Petitioner urges (p. 17): "The conduct of the state officers in the instant case was exactly parallel to that of the respondents in the *Classic* case. It follows, therefore, that the decision of the court below in the instant case was inconsistent with the decision of this court in the *Classic* case." The case at bar involves a primary election of candidates for the general assembly of the State of Illinois, not a primary election for candidates for the congress of the United States. The case at bar involves the claim of a defeated candidate that the members of the state primary canvassing board "arbitrarily" denied to him a certificate of nomination, not that qualified voters were denied the right to cast their votes and have them counted. The case at bar involves no claim that the petitioner was deprived of rights secured to him by section 2 of article 1 of the federal constitution, but merely the vague claim that the ruling of the state primary canvassing board of which he complains somehow constituted state action in violation of rights said to be guaranteed to him by the 14th amendment.

It is correctly stated in the opinion of the circuit court of appeals that the holding of this court in *Barney* v. *City of New York*, 193 U. S. 431, although qualified by later decisions, has never been overruled. In the case at bar, as in *Barney* v. *City of New York*, the complaint of the plaintiff relates to a single ruling by state officers, alleged to be erroneous under state law, with nothing more to show state sanction of such ruling. By contrast, in the case of *Iowa-Des Moines National Bank* v. *Bennett*, 284 U. S. 239, 76 L. ed. 265, relied upon by the petitioner, wherein certain

national banking corporations claimed that the taxing officers had for several years exacted from them taxes on their shares of stock at rates higher than those assessed against competing domestic corporations, in contravention both of state law and the equal protection clause of the 14th amendment, it appeared that after years of systematic overassessment of the shares of stock of national banks, the state took no action, despite the protests by the national banks—to bring about equalization of taxes and at the same time insisted upon retaining the benefit of the higher taxes paid by the national banks. As stated by Mr. Justice Brandeis:

> "Here, the exaction complained of was made by the treasurer in the name of and for the state, in the course of performing his regular duties; the money is retained by the state; and the judicial power of the state has been exerted in justifying the retention."

Detailed discussion of other cases cited by petitioner seems unwarranted, either on the question whether petitioner's alleged right to be a candidate for the office of state representative was a right guaranteed by the 14th amendment, or on the question whether the ruling of the members of the state primary canvassing board constituted "state action" within the meaning of the 14th amendment.

The respondents Robert E. Straus, Eli M. Straus and James Levy, co-executors of the last will and testament of Henry Horner, deceased, in their motion to strike the plaintiff's complaint and dismiss the suit, urged as one of the grounds of said motion that it affirmatively appeared from the complaint that the cause of action, if any, which might have existed against Henry Horner during his lifetime, had abated by his death and did not survive against these defendants. (R. 13.) The petition for certiorari ignores this point. There is no provision in the Civil Rights Act for survival of causes of action arising thereunder. Under

the decisions of this court in *Schreiber* v. *Sharpless*, 110 U. S. 76, 28 L. ed. 65, *Patton* v. *Brady*, 184 U. S. 608, 46 L. ed. 713, and *Bank of Iron Gate* v. *Brady*, 184 U. S. 665, 46 L. ed. 739, it is clear that the alleged cause of action against Henry Horner did not survive against the executors of his last will and testament.

The petition for certiorari shows no adequate justification for a review by this court of the judgment rendered by the circuit court of appeals.

Respectfully submitted,

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